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71-1661

Supreme Court, U. S.
FILED
JUN 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

MOVEABLE OFFSHORE, INC.,
Petitioner,

VS.

EARL HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

MOVEABLE OFFSHORE, INC.,
Petitioner,

vs.

EARL HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Moveable Offshore, Inc. prays that a Writ of Certiorari issue to review the opinion and the judgment of the United States Court of Appeals, for the Fifth Circuit, rendered in this civil action on February 22, 1972, and motion for rehearing overruled.

OPINION DELIVERED IN THE COURT BELOW

The opinion of the United States Court of Appeals reported in 455 F.2d 663, appears at Appendix A, infra, pp. A1-A6. It summarily reversed the judgment of the United States District Court for the Eastern District of Texas, Beaumont Division, and remanded it with instructions to enter judgment on the jury verdict for the Respondent.

JURISDICTION

The judgment of the United States Court of Appeals was dated and entered on February 22, 1972. (See Appendix B, pp. A7-A8, infra.) The date of the order overruling petitioner's motion for rehearing was June 13, 1972. The statutory provision relied upon to confer jurisdiction is 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner, a water carrier, under contract with an oil well drilling contractor to move an oilfield drilling rig from a manufacturer's river facility to a drilling platform in the Gulf of Mexico, owed any duty under Texas law to an employee of a derrick barge subcontractor for the safety of the manufacturer's scaffold, not a part of the drilling rig, not necessary to its loading on Petitioner's transport barge, and never in Petitioner's possession or control.

2. Whether the United States Court of Appeals abused its discretion in placing this case on its summary calendar sua sponte and considering the same without oral argument.

3. Whether the United States Court of Appeals erred in not remanding this case to the trial court for its determination of Petitioner's alternative motion for a new trial, complaining that the jury verdict was not sustained by sufficient evidence, was against the weight of the evidence, and the damages awarded the Plaintiff Hall were excessive, which motion the United States District Court did not pass upon.

REGULATIONS WHICH THE CASE INVOLVES

Question No. 2 involves Rule 18 of the United States Court of Appeals, for the Fifth Circuit, 28 U.S.C.A. Rules of the United States Court of Appeals, 1972 Pocket Part, page 58, and same appears at Appendix D, infra, p. A9.

Question No. 3 involves Rule 50(b)(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Rules 43-51, pages 375-376, and the same appears at Appendix E, infra, pp. A9-A11.

STATEMENT OF THE CASE

This case originated upon the filing of a complaint by Respondent Earl Hall, a citizen of Texas, against Petitioner Moveable Offshore, Inc., a citizen of Delaware with its principal place of business in the State of California, to recover damages in excess of Ten Thousand & no/100 ($10,000.00) Dollars exclusive of interest and costs, resulting from personal injuries proximately caused by the alleged negligence of Moveable Offshore, Inc., in failing to provide him with a safe place to work. (R. 17-20) The facts relevant to the questions presented are uncontroverted and, therefore, may be stated in a summary fashion:

The accident happened at the origin of an interstate water shipment.

Dresser-Ideco manufactured, sold and delivered an oil well drilling rig to High Seas, Inc., at Dresser-Ideco's Neches River loading facility in Beaumont, Texas (R. 415), and it left standing in loose ground near the drilling rig a scaffold without footing, which it had leased from the Safway Scaffold Company and erected. (R. 168, 416-418) The scaffold was to have been dismantled, but its employees failed to take it down. (R. 416-418)

High Seas' drilling contractor, Forest Oil Company, made a contract of shipment with Moveable Offshore, Inc. to move the drilling rig from the Neches River facility to Eugene Island, Block 292, onto an offshore platform in the Gulf of Mexico. (R. 443-444, 446, Defendant's Exhibit 10) Moveable subcontracted the loading of the drilling rig on its transport barge, to Brown & Root, Inc., who agreed to furnish a derrick barge with a crane, slings, shackles, supervision and operating crew—all the equipment that was necessary to pick up the drilling rig and set it on the transport barge. (R. 185, 446-450, Defendant's Exhibit 11)

On the morning of July 26, 1969, Brown & Root's derrick barge, Big John, fully equipped with a crane, slings and shackles, and its supervisors and operating crew, including Respondent Hall, arrived at the Neches River facility. (R. 121-123, 141-143, 179, 253) Moveable's transport barge was not there, and it did not get there until after Hall's accident. (R. 143, 318-320) While awaiting the arrival of Moveable's transport barge, the Brown & Root employees started tieing on the derrick barge lines, slings and shackles to the drilling rig, and Hall first used the built-in stairways on the drilling rig to get up to, and come down from, the top of the rig. (R. 155, 183, 216-217) At that time there were other persons, not employed by Moveable or Brown & Root, and whose identity and employer are unknown, using the scaffold—going up and down it. (R. 152-153). It was at this time that Hall went up on the scaffold (R. 154) to throw a tag line to a fellow employee on the rig (R. 183, 259-260) and the scaffold started going backwards and Hall dropped to the ground, breaking his leg. (R. 261-262)

Dresser-Ideco did not give Moveable, Brown & Root or Hall permission to use the scaffold (R. 419); no one

gave Hall permission to use it (R. 280), and no one told him to use it. (R. 157)

At and before Hall's accident, Moveable was not the owner, lessee or occupier of the Neches River facility, nor the scaffold. (R. 312-313, 416-418) It had no agreement with Dresser-Ideco of any kind. (R. 419) Moveable had not taken possession of the premises, the drilling rig, or the scaffold; it had no equipment on the premises (R. 315); its transport barge had not arrived (R. 320); and it had no employees there. (R. 186, 198, 255, 319) The scaffold was not necessary or useful to load out the rig. (R. 185, 469-470) Moveable was not in control, and it had no right to control the scaffold or its use.

Upon these absolute, proven and uncontradicted facts, the jury returned a verdict for Hall and against Moveable, for the sum of Fifty-one Thousand Five Hundred & no/100 ($51,500.00) Dollars. (R. 56) Moveable timely filed a motion for judgment, notwithstanding the verdict under Rule 50(b) F.R.C.P., and in the alternative, for a new trial under Rule 50(c) F.R.C.P. (R. 71-88) The trial court granted the motion for judgment and signed and entered judgment, dismissing the action with prejudice. It did not pass upon the alternative motion for a new trial. (R. 89-90) Respondent appealed from the action of the trial court granting the Petitioner's motion for judgment non obstante veredicto and the judgment dismissing his case with prejudice; he did not assign as error the failure of the trial court to pass upon the Petitioner's alternative motion to dismiss.

REASON FOR GRANTING THE WRIT

1. The United States Court of Appeals Has Decided an Important State Question in a Way in Conflict with Applicable Texas Law.

The decision of the United States Court of Appeals, holding that a water carrier, under contract with an oil well drilling contractor to move an oil well drilling rig from a manufacturer's facility to a drilling platform in the Gulf of Mexico, owes a duty under Texas law to an employee of a derrick barge subcontractor for the safety of the manufacturer's scaffold, not a part of the drilling rig, not necessary to its loading on the transport barge, not erected by the water carrier and never in its possession or control, is in direct conflict with Texas law, as declared by its Supreme Court.

In *Smith* v. *Henger* (Tex.1950) 226 S.W.2d 425, 431, the Texas Supreme Court recognized that the law places upon the owner or occupant of land the duty to use reasonable care to make and keep the premises safe for the use of persons invited to use the premises for business purposes, and that where the owner puts some other person in control of the premises, or a part of them, such person likewise has the duty to keep the premises under his control in safe condition. In every case in which liability has been determined against a general contractor, in a tort case, the general contractor was in possession of the equipment on the premises. *Robert E. McKee, General Contractor* v. *Patterson* (Tex.1954) 271 S.W.2d 391; *Halespeska* v. *Callihcn Interests, Inc.* (Tex.1963) 371 S.W.2d 368.

The Texas Supreme Court in *Oliver* v. *Snowden* (Tex. 1968) 426 S.W.2d 545 had before it a case of first impression, where a subcontractor had erected a scaffold

for his own use, and he did not object to the occasional use of his scaffold by the employees of the general contractor. When one of the employees of the general contractor was using the scaffold, it broke, and such employee sustained personal injuries for which he sued. Since this was a case of first impression, the Texas Supreme Court turned to other jurisdictions for guidance. It cited, approved and quoted from the case of *Munson* v. *Vane-Stecker Co.*, 347 Mich. 377, 79 N.W.2d 855, which held that a steelwork subcontractor injured when a defective scaffold broke as he attempted to climb it, could not recover from a general contractor, who neither owned nor erected the scaffold, saying on page 450:

> "In the present case all witnesses agreed that Oliver erected the scaffold for his own use and permitted Snowden and others to use it. The evidence shows at most that Snowden was using and occupying the scaffold by acquiescence and not by invitation. Permission is not sufficient to turn the scale in favor of Snowden's status being that of an invitee x x x 'A permission, whether express or implied, is not an invitation to enter or use, and establishes no higher relation than that of mere licensor and licensee'."

The speculation of the United States Court of Appeals that "Moveable could anticipate that in rigging the rig for hoisting by the derrick barge, it might be necessary for workers to use some parts of the scaffolding which was so closely adjacent to the rig and had in fact been directly used in its construction. At least, it was not an unlikely or unnatural thing for workers to use this available and apparently adequate facility" cannot be squared with the Texas decisions, which require posses-

sion and actual control by a general contractor of the scaffold as a predicate to any duty owed to the employees of a subcontractor.

2. The Decision of the United States Court of Appeals Raises Grave Problems for the Water Carriers of Oil Well Drilling Rigs to and from Offshore Drilling Platforms.

The decision of the United States Court of Appeals in this case makes the water carrier responsible for the safety of scaffolds, all equipment and the premises, owned, erected, occupied or controlled by other persons at the place of origin of the shipment, and this is an onerous and unjust burden on this character of commerce. In order to protect itself the water carrier would have to inspect, keep, maintain, repair or remove all such equipment which it was neither the owner, erector or controller, and from which it received no benefit. Economically, this would be impossible.

The question whether the water carrier would be liable would depend upon which forum the plaintiff filed his suit; that is, if Plaintiff could satisfy the requisites of diversity jurisdiction of the United States District Court, the water carrier would have to respond in damages; if the Plaintiff was required to invoke the jurisdiction of the Texas District Court, the water carrier would be protected. The rights and liabilities of the water carrier should not be made to depend upon the jurisdiction of any court; its rights and liabilities should be settled by the law of the state where the accident occurred.

This new and growing water transportation had its origin in the need for additional exploration for oil and gas because of the decline in reserves. The origins of the shipment are the manufacturer's water facilities, where

the oil well drilling rigs are loaded on transport barges by cranes, and the destinations are on drilling platforms in the Gulf or the oceans. The movement is reversed when the drilling rigs have to be repaired. The loading at origin and the unloading at destination are inseparable parts of this commerce. The rights and liabilities of the water carrier at the point of loading should be stabilized and made uniform, and so avoid an undue burden on this necessary commerce, so important to the welfare and defense of these United States.

3. The United States Court of Appeals Abused Its Discretion in Denying the Petitioner the Right to Be Heard and in Summarily Considering and Deciding This Important Case.

From the statements hereinbefore made, it appears that this is an important case and the decision summarily made, will have a serious impact upon the water carriers of oilfield drilling rigs—their costs of operations, rates and charges will have to be adjusted in an upward swing.

4. The United States Court of Appeals Has Rendered a Decision in Conflict with the Decision of Another Court of Appeals on the Same Question.

The United States Court of Appeals summarily considered the appeal of this case and reversed the judgment of the trial court and remanded it for entry of judgment on the jury verdict for the Plaintiff. Petitioner had filed, and the trial court did not act upon its alternative motion for a new trial on the grounds of insufficiency of the evidence that the verdict was against the weight of the evidence and was excessive. (R. 57-59, 88-90)

In reversing the judgment of the trial court the appellate court should have remanded the case for the trial court's determination of the alternative motion.

The United States Court of Appeals for the Ninth Circuit, in *Gordon Mailloux Enterprises* v. *Firemen's Insurance Company of Newark, New Jersey* (1966) 366 F.2d 740 held that the trial court's ruling on a motion for judgment non obstante veredicto did not dispose of alternative motion for new trial on ground that the verdict was against the weight of the evidence, and that the trial court's rulings were required on both motions, and, therefore, the appellate court would not direct entry of judgment on verdict but would remand the case to the trial court for the disposition of the alternative motion for a new trial. On pages 741-742, the court said:

> "The court was not limited to a choice between the two motions and, since each had its own office, the ruling upon one did not dispose of the other. In recognition of the different considerations underlying these respective motions, and to expedite the ultimate disposition of litigation, Rule 50(c)(1) and (d), in effect at the time the motions were made, required rulings on both. However, the court made no ruling on the motion for new trial x x x But in this case, even if the trial court so ruled, we would not overturn the order, for here the evidence is such that the decision is properly one for the trial court in the exercise of its discretion. The trial court must now act upon the undisposed-of-motion."

The foregoing decision was cited with approval in *Minthorne* v. *Seeburg Corporation* (U.S.C.A. Ninth Cir. 1968) 397 F.2d 237, 243.

The issue raised by this conflict is of continuing importance and should be resolved by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

..... day of ....., 1972.

Respectfully submitted,

.....

OF

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Certiorari have been served upon counsel for Respondent by Certified Mail, return receipt requested, at the following addresses:

Michael M. Fricke
1015-A Virginia Street
Port Lavaca, Texas 77979

Allison, Maddin, White & Brin
2100 The Six Hundred Building
Corpus Christi, Texas 78403

and that all parties required to be served have been served.

...., 1972.

.....

Counsel for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2914

Summary Calendar*

EARL HALL,
Plaintiff-Appellant,

versus

MOVEABLE OFFSHORE, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(February 22, 1972)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

BROWN, Chief Judge: The central question in this appeal sounds more like a riddle—Who was in control of a scaffold without feet? The jury had the answer, but the Trial Court thought otherwise. The jury was right—or more accurately, theirs was the exclusive province to determine the issue after sifting through contested facts—and accordingly we reverse the Trial Court's judgment n.o.v. which dismissed Plaintiff's case.

The scenario in what would normally have been another multi-party donnybrook in which all lash out

*Rule 18, 5 Cir., See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

against each other, involves the following cast of characters in the order of their appearance, but headed by Hall, the injured Plaintiff, and Moveable Offshore, Inc., the sole Defendant. Dresser-Ideco sold an offshore drilling rig to High Seas, Inc. During construction of the rig at the Dresser Beaumont facility, scaffoldings leased from Safway Scaffold Company (whose name turned out to be somewhat less than prophetic) were erected about the rig, and particularly between the rig and the waterway through which it would eventually be carried to the drilling site. Forest Oil Company, drilling contractor for High Seas, hired Moveable Offshore, Inc. (Defendant) to transport the finished rig from the Beaumont facility down the Neches River to a drilling platform in the Gulf of Mexico. Moveable did not have available[1] a derrick barge required to load the rig, and accordingly contracted with Brown & Root, Inc. to furnish its derrick barge, the "Big John," and a crew to load the rig onto Moveable's transport vessel. Earl Hall (Plaintiff) was an employee of Brown & Root, who was injured while involved in this operation.

The injury occurred while Hall was assisting in attaching a tagline from the derrick barge to the drilling rig. In this readily foreseeable pursuit, he had climbed the scaffolding adjacent to the rig to throw one end of the tagline to a fellow employee, the other end being fastened to the barge. At this time one of the legs of the scaffold began to sink into the ground and the scaffold began to tilt dangerously. Fearing that he would be trapped beneath the scaffold or thrown therefrom, Hall jumped to the ground as the scaffold was tilting over. As

1. The original agreement between Forest Oil Company and Moveable Offshore called for the use of a derrick barge from Livingston Shipyards at Orange, Texas, but when the rig was ready to be moved, Livingston Shipyards was on strike.

a result of this fall, he sustained permanently disabling injuries.

Had the scaffolding been equipped with "feet" or some other suitable support beneath its tubular legs, the accident would never have occurred. Hall sued Moveable for its failure to provide him with a safe working place and for its negligent failure to inspect and discover dangerous conditions at the working site and to protect him against or warn him of these obstacles to safe performance of his duties. On a general verdict, the jury awarded him $51,000, but the Trial Court entered judgment n.o.v. for Moveable.[2] Hall appeals.

The question in this case is nominally one of duty.[3] The rule in this Texas diversity action is that, "A general contractor *in control* of premises owes a duty to the employees of subcontractor similar to that owed by an owner or occupier of land to his invitees." *McKee v. Paterson*, Tex. S.Ct., 1954, 271 S.W.2d 391, 393 (emphasis added); *Smith v. Henger*, Tex. S.Ct., 19—, 266 S.W.2d 425. Therefore, the real crucial question becomes—Was Moveable "in control" of the facility then being used which was located on the Dresser premises? This was a question of fact, submitted to the jury for a general verdict on proper instructions. Implicitly—by virtue of the general verdict for Plaintiff—the jury found that Moveable was in control of the "premises."

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2. The order granting Defendant's motion for judgment notwithstanding the verdict does not set forth the particular reasons why the Trial Court deemed this action appropriate. It merely says that the Court has considered the motions and briefs of the parties and is of the opinion that Defendant's motion for judgment notwithstanding the verdict should be granted. Against the background of the requisite motion for directed verdict, his reasons could have included any one or more or all of the seven specifications, some five of which inferentially cover the issue of "control."

3. Proximate cause and damages are not contested—it is admitted that failure to inspect the scaffold and warn the Plaintiff proximately caused the injury.

The issue was contested, but there is sufficient evidence in the record to support the jury finding on this issue.[4] After all, Moveable was the party who engaged

4. The facts upon which the jury could have found Moveable to be in control of the scaffolding are well summarized in Hall's brief and we find the following excerpt an accurate and apposite abstract of the relevant evidence.

> "Although [Moveable has] consistently denied that they had any right to control any portion of the Dresser-Ideco premises during these operations, it would seem implicit in the agreement which they entered into to move the drilling rigs that it was necessary for them to take temporary control of so much of Dresser-Ideco's premises as was necessary to effectuate the movement of the rig. This involved the bringing in of sufficient crew members to do the preliminary work which necessitated the use of the ground around the drilling rig and including the area in which the scaffold was located. As a matter of fact, the record indicates that the scaffolding was directly between the rig and the water. The Texas Supreme Court has held that in any event actual physical possession of the premises is not a necessary element of control as long as there is a right to manage whether it is exercised or not. See *American Fidelity & Casualty Co. v. Traders and General Insurance Co.*, 160 Tex. 555, 334 SW2d 772 (Tex.Sup. 1959). A witness for [Moveable], Mr. Clarence Thibodeau, who was the safety engineer for Moveable Offshore at the time of this accident, testified that he was on the Dresser-Ideco premises prior to the move in question, that he made an inspection "concerning Moveable Offshore's part, yes sir" (Tr. 235) and in response to a particular question asking if he had made an examination of the premises to see if there was anything there that might be hazardous to workingmen which they might not discover, Mr. Thibodeau testified, "I would imagine every site I do go on, sir, I do give it a complete examination and if I would have found something danger (sic), I would have notified anybody on the site". He further testified during this same line of questioning that he had seen the scaffolds, but that he couldn't say that he specifically looked at them in a sense like he would have done if his own company had been going to do the work that the Brown & Root employees were doing.
>
> * * *
>
> Another of [Moveable's] witnesses, Mr. Leroy Spell, who is a foreman with Dresser-Ideco and was foreman over the waterfront facility involved in this accident at the time of the accident (Tr. 319), testified that Moveable Offshore and anybody else who came in under them came in with the permission and authority of Dresser-Ideco. He further testified that Dresser-Ideco made no attempt to exercise any control either over the manner by which the rig was removed or who performed such work. He testified that such control was left up to the contractor (in this case, Moveable Offshore).

Brown & Root to discharge functions which were essential to performance of Moveable's obligations. Moveable could anticipate that in rigging the rig for hoisting by the derrick barge, it might be necessary for workers to use some parts of the scaffolding which was so closely adjacent to the rig and had in fact been directly used in its construction. At least, it was not an unlikely or unnatural thing for workers to use this available and apparently adequate facility. Its location between the drilling rig and the water made it either essential or appropriate that it be used in executing the lift and transfer of the rig from the land onto a vessel. The practical necessities to carry out Moveable's engagement and the willingness of Dresser (the temporary "possessor" of the scaffolding before Moveable) that the scaffold be used if needed by Moveable or its subcontractors is quite enough to sustain the jury finding of control.

Since Moveable was in control of the premises, the only question remaining is the scope of the duty owed to Hall. The jury instructions correctly defined the duty as being "to inspect and discover dangerous conditions, and to protect his invitee from dangers of which the occupier knows, or of which he should have known in the exercise of ordinary care." The instructions also defined the duty to include the responsibility "to warn in-

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He further testified that Dresser-Ideco had disclaimed any right to control the area where they were working while removing the drilling rig, that this control had been relinquished to the general contractor, that he understood that Mr. Thibodeau with Moveable Offshore was the man who was in charge of the operation and Brown & Root was working for him. He further testified that he knew that they were all there with his permission and consent under that arrangement. (Tr. 336, 337, 338, 339, 340). Previously, Mr. Spell had agreed that anything that had been left there by Dresser-Ideco that was in the way of the contractor or the subcontractor would have to be moved out of the way and he agreed that the contractor or subcontractor had the right to do that and have control over that. (Tr. 336)."

vitee" of dangerous conditions on the premises.[5] It is undisputed that Moveable failed to fulfill this duty, and that such failure proximately caused Hall's injuries.

Thus, accepting Moveable's construction of Texas law, and the jury verdict which rested on unassailable instructions and which is amply supported by sufficient evidence, judgment n.o.v.[6] was improper and must be reversed and remanded for entry of judgment on the jury verdict for the Plaintiff.

REVERSED and REMANDED.

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5. Once it was established that Moveable was "in control" of the area about the scaffolding, its duty must be measured by the standard of care applying to owners or occupiers of land, in this Texas diversity suit. That duty was defined in a very similar case decided recently by the Texas Supreme Court. See, Guidry v. Neches Butane Products Co., 1972, Tex. S.Ct., ____ S.W.2d ____ [January 5, 1972, 9 TLWL 1]. In *Guidry*, the injury was caused by a hidden weight bearing weakness in the soil surface and occurred when an outrigger on a crane sank into the ground causing the heat exchanger being lifted by the crane to be suddenly and unexpectedly lowered, injuring Plaintiff. In reversing the Court of Civil Appeals affirmance of summary judgment granted for landowner, the Texas Supreme Court held that the landowner owed a duty to contractor's employees to inspect and discover hidden dangerous conditions and to warn contractor or his employees. That is the same duty being asserted in this case, and which it is undisputed Moveable failed to fulfill.

6. The crucial questions of whether or not Moveable controlled the premises and, if so, whether its then-admitted duty was breached were questions of fact on which the evidence was not "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might [not] reach different conclusions." Boeing Company v. Shipman, 5 Cir. (en banc), 1969, 411 F.2d 365, 374. There was enough "conflict in substantial evidence to create a jury question." Id. at 375.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2914
Summary Calendar

D. C. Docket No. CA 6917

EARL HALL,
Plaintiff-Appellant,

versus

MOVEABLE OFFSHORE, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for entry of judgment on the jury verdict for the Plaintiff;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

February 22, 1972

Issued As Mandate:

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2914
Summary Calendar*

EARL HALL,
Plaintiff-Appellant,

versus

MOVEABLE OFFSHORE, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(June 13, 1972)

On Petition for Rehearing

Before BROWN, Chief Judge, INGRAHAM AND RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX "D"

Rule 18. Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

APPENDIX "E"

Rule 50. Motion for a Directed Verdict

(a) Motion for Directed Verdict: When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the ac-

tion to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963.

FILE COPY

FILED
JUL 21 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1661

MOVEABLE OFFSHORE, INC.,
Petitioner,

vs.

EARL HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF SAID COURT:

QUESTIONS PRESENTED

I. Did the Court of Civil Appeals render a decision on a State question in a way in conflict with applicable State law when it ruled that an owner/occupier owes a duty under Texas law to the employee of its subcontractor to provide him with a safe place to work?

II. Did the Court of Civil Appeals abuse its discretion in placing this case on its summary calendar sua sponte, and considering it without oral argument?

III. Did the Court of Civil Appeals err in reversing and remanding this case for entry of judgment on the jury verdict for the Respondent?

COUNTER-STATEMENT OF THE CASE

For the Court to have a complete picture of the case Respondent directs the Court's attention to Appellant's "Statement of the Case" found in its Brief on file with the papers of this cause.

PETITION ASSERTS NO REASON FOR GRANTING WRIT UNDER RULE 19

The Petition does not directly or affirmatively show wherein there is any reason for granting certiorari in this case encompassed within Rule 19 of this Court. Petitioner has failed to show that Court below is in conflict with Texas law on an important state question, that the Court below abused its discretion so as to raise an important Federal question, or that the Court below is in conflict with this or any other Federal Court or has decided an important question of Federal law which should be settled by this Court.

As none of the basic reasons set forth in Rule 19 of this Court governing the granting of certiorari are present in this case, the Respondent respectfully submits that the Petition should be denied.

I.

The Court Below Followed the Controlling Texas Law on the Question of the Duty Owed by an Owner/Occupier to the Employee of Its Subcontractor to Provide Him with a Safe Place to Work.

Petitioner cited the five cases mentioned in its Petition in both its Motion for Rehearing and its Appellee's

Brief. Respondent respectfully directs this Court's attention to the Fifth Circuit opinion found at pages A1-A6 of Petitioner's Appendix "A" and to Appellant's Brief and Appellant's Reply Brief. Respondent by so directing does not wish to imply that it is taking a cavalier attitude; however, for the sake of brevity it feels that it has amply discussed this point and it would serve no purpose to this Court, unless directed otherwise, to write the same twice.

II.

The Court Below Did Not Abuse Its Discretion in Placing This Case on Its Summary Calendar Sua Sponte, and Considering It Without Oral Argument.

Respondent would point out to this Court that the Fifth Circuit Rule 18, 28 U.S.C.A., 1972 Pocket Part, page 58, has been explained by the Fifth Circuit in the case of *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 431 F.2d 409 (5th Cir., 1970), and this Court has upheld its practice in *United States* v. *Ambers*, 416 F.2d 942 (5th Cir., 1969), cert. den. 90 S.Ct. 686; *In re Louisiana Loan & Thrift Corp.*, 416 F.2d 898 (5th Cir., 1969), cert. den. *Holahan* v. *Reynolds*, 90 S.Ct. 912.

Petitioner decided the case was of grave import for the exercise of its vocal cords only after it was about to run out of Courts, but failed to assert the importance of its position for oral argument to the Fifth Circuit on any occasion past.

III.

The Court Below Properly Entered Judgment on the Verdict for Respondent.

A. Petitioner Filed No Motion for New Trial in Compliance with Rule 50, F.R.C.P., 28 U.S.C.A., Pages 375-376.

Petitioner filed what was entitled a Motion for Judgment notwithstanding the verdict and an alternative Motion for New Trial. (Appendix, pages 57-58). But for what relief did Petitioner pray? Its Motion relating to a new trial stated,

> "In the alternative, *if the foregoing motion is not granted,* the Defendant moves the Court for an order vacating and setting aside the verdict of the jury, and granting the Defendant a new trial, . . ." (Appendix, page 57) (Emphasis added)

Although this Supreme Court in considering the practice under Rule 50 as it relates to a conditional or alternative motion for new trial concluded that the phrase "'in the alternative' means that the things to which it refers are to be taken not together but one in the place of the other." *Montgomery Ward & Co.* v. *Duncan,* 61 S.Ct. 189, 194. Respondent would point out that the trial court gave Petitioner exactly that for which it prayed—Judgment notwithstanding the verdict. (Appendix, pages 89-90).

In essence the Court has said that the second ruling must be made, but it does not come into being unless the first ruling is vacated on appeal. But, is there anything in Rule 50 or any other rule which says that Petitioner cannot condition its motion on something other than an Appellate decision overruling the trial court holding for judgment notwithstanding the verdict? Respondent respectfully submits there is not! Petitioner can, it is sub-

mitted, condition its motion upon the happening of any event; and Petitioner herein conditioned its motion on the event, and none other, that the Trial Judge must not grant its motion for judgment notwithstanding the verdict. When the Trial Court ruled in favor of Petitioner on its motion for judgment notwithstanding the verdict Petitioner had no motion for new trial pending before the Court and it is obvious that Petitioner was of the same understanding. The Trial Court completed its duty to Petitioner and by Petitioner's own motion, there was nothing left undone by the Trial Court.

Are we to now say to the Petitioner and the Trial Court, "Petitioner, the Trial Court is not to rule upon the plain language of your motion and Trial Court, you are not to rule in accordance with the plain language of Petitioner's motion, but you are instead to measure Petitioner's motion by its unexpressed intention or wants, if any, or if not supply them for Petitioner." This court, however, laid down a different rule in *Johnson* v. *New York, N.H. & H.R. Co.*, 73 S.Ct. 125. In that case it was held that where a party files a motion for a directed verdict it cannot argue that it was intended to be a motion for judgment in its favor or a new trial. At page 127 of that opinion this Court wrote:

> "The defect in this argument is that Respondent's motions cannot be measured by its unexpressed intention or wants. Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely Petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of Respondent's counsel. Respondent's motion should be treated as nothing but what it actually was,

one to set aside the verdict—not one to enter judgment notwithstanding the verdict."

We have a similar situation here. Was it the duty of the trial court to point out to Moveable that it could have an alternative ruling for a new trial? Was it the duty of Earl Hall to point out that Moveable could assert, in addition to its motion for judgment notwithstanding the verdict, a motion for new trial in the alternative? Was it the duty of the Fifth Circuit to change the wording of its motion for new trial when Moveable never asked it to? Does everyone have a duty to Moveable and Moveable have no duty? Does Moveable have no duty to the Trial Court to fairly appraise it of what remedy it is seeking? Does Moveable have no duty to Earl Hall to fairly appraise him of the true import of its motion, to with vigor and tenacity assert its right to a ruling, or must Earl Hall be forced to convince the Trial Court that Moveable did not mean what it said and that it must rule on a motion for new trial or fall victim to Moveable's ping-pong diplomacy in the Federal Judiciary, forever moving from court to court? Does Moveable have no duty to the Fifth Circuit to fairly appraise it of Moveable's alleged Motion for New Trial pending in the Trial Court?

If this Court grants this writ and rules that this case must be remanded to the Trial Court for a decision as to whether or not Moveable is entitled to a new trial, it is saying in effect that everyone owes a duty to Moveable, but Moveable owes no duty to anyone. The question of duty got us in the courthouse in the first place. Moveable contends it has no duty to provide a safe place to work and now contends that it has no duty to the Federal Courts—at least Moveable has been consistent.

Additionally, Respondent would bring to the Court's attention *Neely* v. *Martin K. Eby Construction Co.*, 87 S.Ct.

1072, wherein it was stated at page 1080, along with other matters of interest, that:

> "It was, of course, incumbent on the Court of Appeals to consider for new trial questions in the light of its own experience with the case. But we will not assume that the Court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question."

Therefore, it would appear that both the Court of Appeals and the Trial Court did its duty unto Moveable not as Moveable had done its duty unto them, but had considered that it had no motion pending in the Trial Court, possibly for reasons as set out by Respondent above or for other reasons known only unto themselves.

B. Petitioner Abandoned Its Motion for New Trial, If Any, Because of the Absence of Any Attempt to Secure a Disposition of Motion.

For the sake of this portion of Respondent's brief, we shall assume that Petitioner in the first instant presented to the Trial Court an alternative, conditional motion for new trial which has not been ruled upon. Therefore, assuming that Petitioner has filed an alternative motion for new trial which was not ruled upon by the Trial Court the question then becomes does that motion have a shelf-life or does it have an existence which can be extinguished only when ruled upon by a trial judge. Or, put another way, must the movant affirmatively state somewhere in the proceedings that it is not his intention to have a ruling—that he has abandoned the motion, or may the Trial Court and the Appellate Court safely assume that where the movant never presses for a ruling at the Trial Court, nor briefs his points in his trial brief, nor assigns error in the Appellate Court, nor briefs the point in his Appel-

late brief, nor prays for a remand for a ruling, he has abandoned the motion?

Respondent respectfully submits that if the above facts are present there has been an abandonment of the motion for new trial.

The sequence of events are thus:

March 22, 1971, Petitioner filed motions entitled: MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT UNDER F.R.C.P., RULE 50 (B) AND IN THE ALTERNATIVE MOTION FOR A NEW TRIAL UNDER F.R.C.P., RULE 50 (C). (Appendix, pages 57-58).

March 22, 1971, Petitioner filed its BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. (Appendix, pages 59-69). No mention being made of the motion for new trial.

June 21, 1971, Trial Court entered ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. (Appendix, pages 88-89).

June 24, 1971, Trial Court entered JUDGMENT FOR THE DEFENDANT NOTWITHSTANDING THE VERDICT.

November 16, 1971, Petitioner filed its APPELLEE'S BRIEF. Under heading, "B Course of the Proceeding," pages 2 and 3, Petitioner wrote in connection with its motion for new trial:

> "Moveable timely filed its motion for judgment notwithstanding the verdict under Rule 50 (B), F.R.C.P. and in the alternative, a motion for new trial under Rule 50 (c), F.R.C.P. (App. 71-88) granted the motion for judgment notwithstanding the verdict. (App. 88-89)."

Nothing was said anywhere else in the brief about the motion for new trial. As a matter of fact, under the heading "CONCLUSION", page 17, it asked for relief that, "Moveable prays that the judgment of the District Court be affirmed."

February 22, 1972, the Court of Appeals reversed the Trial Court and ordered that the jury verdict be reinstated, and Moveable discovered it had a duty for the first time, at law.

March 3, 1972, Moveable filed its PETITION FOR REHEARING OF MOVEABLE OFFSHORE, INC., THE DEFENDANT-APPELLEE, wherein Moveable, after having discovered that it had a duty to Earl Hall, tried once again to pass its duty on to others. For the first time Moveable made complaint that it had a pending motion for new trial, thereby attempting to place the duty upon the Appellate Court to send the case to the Trial Court to assume the duty to pass upon its motion for new trial. On page 6 of its petition for rehearing without citing authority, under the heading, "THE POINTS OF LAW WHICH THE COURT HAS OVERLOOKED OR MISAPPREHENDED," Moveable wrote:

> "10. If the Court reverses the Judgment of the Trial Court, it should remand the case for the determination of Defendant's alternative Motion for a New Trial which was not decided by the Trial Court."

and at page 12,

> ". . . and in the alternative, it prays that if the Court does reverse the judgment of the trial court, that the court remand the same for the disposition of Defendant's alternative motion for a new trial, . . ."

June 21, 1972, Moveable filed its PETITION FOR WRIT OF CERTIORARI.

Therefore, from March 22, 1971, to March 3, 1972, there is no mention anywhere in this Record of Petitioner asserting any right to have its motion ruled upon. Why is this? Was Petitioner convinced that his judgment notwithstanding the verdict would withstand an attack by Earl Hall? Did Petitioner forget about the motion, and only remember it when its case turned from sweet wine to vinegar?

Although Petitioner cites only two cases from the Ninth Circuit, *Gordon Mailloux Enterprises* v. *Fireman's Insurance Company of Newark, New Jersey*, 366 F.2d 740 (9th Cir., 1960) and *Minthone* v. *Seeburg Corporation*, 397 F.2d 237 (9th Cir., 1968), which Respondent will discuss later, no discussion of Rule 50 is complete without an understanding of the *Montgomery Ward* case cited earlier.

There are three important points as relates to this case in *Montgomery Ward*. They are:

(1) That the Court there did not say that a party could not elect to proceed on its motion for judgment and in effect withdraw or abandon its motion for new trial.

> "While we took the case to review the Circuit Court's construction of the rule, it is true that if the defendant elected to stand on its motion for judgment and, in effect, withdrew its motion for a new trial, we do not reach the question involved in our grant of certiorari." *Supra* at page 193.

(2) In that case the Court did find that there was no election or withdrawal under the facts.

(3) The Court in 1940 found the procedure permitted by Rule 50 to be "novel" and the practice at that

time was for the defendant and trial judge to expect the motion for new trial to be left for a later disposition if the Appellate Court should overrule the judgment on Appeal. There can be no such expectations on the part of Petitioner here. The *Montgomery Ward* case has been around for some 32 years and the Rule has been the same, although amended in 1963 to conform to the practice already in existence. See the *Neely* case where this Court held that the 1963 amendments were made to implement the earlier Court decisions, and the Committee Reports, 31 F.R.D. 654.

This language, that the 1963 Amendments did not change the existing rules, is important to Respondent's position when we consider the case of *Vera Cruz* v. *Chesapeake & Ohio Railroad*, 312 F.2d 330 (7th Cir., 1963), cert. den. 84 S.Ct. 44. The *Vera Cruz* decision was handed down January 10, 1963, rehearing was denied February 14, 1963, Rule 50 was amended January 21, 1963, and became effective July 1, 1963. It is, therefore, safe to assume that the 7th Circuit knew of the amendments and that, in any event, the existing practice was not changed but only clarified.

In *Vera Cruz* the trial court found a conflict between the general verdict and the special interrogatories, therefore, a judgment notwithstanding the verdict was entered for defendant. Defendant had filed a motion for judgment notwithstanding the verdict which was joined with an alternative motion for new trial. The District Court did not rule on the motion for new trial. Plaintiff appealed and the Appellate Court reversed the Trial Court grant of judgment notwithstanding the verdict and remanded for entry of judgment on verdict for plaintiff.

The Court stated at page 332,

> "Appellees cite Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940), as requiring this court to remand for a ruling on their alternative motion. *But their brief fails to argue the application of that rule here.* In Montgomery Ward there was a sustained effort to have the District Court rule on the alternative motion under Rule 50 (b). There is no showing here that any similar attempts were made after judgment notwithstanding the general verdict was entered under Rule 49 (b). *On this record the District Court might, with jurisdiction, have assumed that Appellees had abandoned the motion.*" (Emphasis added)

The case before this Court is even stronger for the proposition that Petitioner had abandoned its motion for new trial. In *Vera Cruz,* Defendant had raised the issue in the Appellate Court, here Petitioner never raised it until its motion for rehearing.

Nowhere in Petitioner's Brief nor in its Motion for Rehearing does it argue the application of Rule 50. See page 332 of *Vera Cruz.* Moveable never raised any argument until after judgment by the Fifth Circuit, and even then failed to show the application of Rule 50 to it; therefore, this Honorable Court can with justification assume, as the Fifth Circuit and Trial Court apparently did, that Petitioner had abandoned the Motion for New Trial.

Although Respondent agrees that at the Trial Court Petitioner had a right to file a motion for conditional ruling for new trial, and had a right to have a ruling on the motion, Respondent feels that Petitioner also has a right to abandon that Motion, however, if Petitioner wishes to assert that right, and does not abandon that right there

is no reason why Petitioner may not, and *should not,* cross-assign error, in the appellant's appeal, for the failure of the trial judge to rule on its Conditional Motion for New Trial.

This Court in the *Montgomery Ward* decision, pages 195-196, saw

> ". . . no reason why the appellee may not, and *should not, cross-assign error,* in the appellant's appeal to rulings of law at the trial, so that if the appellate court reverses the order for judgment n.o.v., it may pass on/the error of law which the appellee asserts nullify the judgment on the verdict." (Emphasis added)

Should not the rule be that where the appellee is granted judgment notwithstanding the verdict and there is no ruling upon his motion for new trial *he may and should* in order to show the Appellate Court that he has not abandoned that motion cross-assign error in the appellant's appeal so that if his judgment notwithstanding the verdict is overruled he can have his case remanded for a ruling on his motion for new trial, and that if the appellee does nothing at the trial level to assert his right to a ruling and does nothing at the Appellate level to assert his right to a ruling, he can fairly be treated as having abandoned that motion for new trial? Fairness to the trial court, the Appellate Court and Appellant, and a fair reading of the rules would seem to dictate that an Appellee, Petitioner here, cannot abandon his motion and then at some later stage in the proceedings when all seems lost be able to say, "King's—X."

Moveable, in its Petition for a Writ of Certiorari to this Court cites *Gordon Mailloux Enterprises* and *Minthone* for the proposition that there is a conflict between the decision in the Fifth Circuit opinion of this case and

that it is entitled on the strength of the above two opinions to have this case remanded to the trial court for a decision by the trial court on its motion for new trial.

There is no conflict. The decision by the Fifth Circuit is well supported by the decision of the Seventh Circuit in the *Vera Cruz* case. Although the Fifth Circuit in this case did not write on the question of new trial in its opinion and expressed no opinion as to Petitioner's Motion for Rehearing, this Supreme Court can assume as it did in *Neely* v. *Martin K. Eby Construction Co.*, 87 S.Ct. 1072, rehearing denied, 87 S.Ct. 1366, that,

> "It was, of course, incumbent on the Court of Appeals to consider the new trial question in the light of its own experience with the case. But we will not assume that the Court ignored its duty in this respect, although it would have been better had its opinion expressly dealt the new trial question." (87 S.Ct. 1072, 1080)

Defendant in *Minthone* unlike Petitioner in this case briefed its contention that it had a right to a ruling on its motion for new trial as to damages, and in the *Mailloux* case, Defendant raised the point on appeal and vigorously asserted its right to have the motion heard by the Trial Court.

C. Petitioner Waived Any Rights It Might Have to Have Motion for New Trial, If Any, Ruled upon by Trial Court by Failing to Bring It to Attention of Court of Civil Appeals until It Filed Its Motion for Rehearing.

Although the concept of waiver and abandonment are similar, waiver is properly in the realm of a conscious choice, or that the surrounding circumstances are such that one could reasonably infer that the party's failure to act in a given situation where he knew or should have

known by the exercise of reasonable care and diligence that a right would be lost if he took no affirmative action, and, therefore, it is imputed to him a conscious choice to abandon a known right by that course of action. However, waiver, it would seem, has elements other than a conscious relinquishing of a known right. It infers that the party may have through negligence, ignorance, inadvertance, or the like forgone the implementation of some right which he may have been entitled to because there is no excuse for his not knowing the right existed.

A party who has a right to a ruling or lack of a ruling or to attack a judgment brought up for review by another ought to fairly be obliged to give advance notice of his intention to assert that right by the fairly simple and inexpensive method of bringing it to the attention of the appellate court, either by filing his own notice of appeal, cross-assigning error in his brief, or merely pointing out the error in his brief. It would seem that the party who initiates review is entitled to such notice, and neither this court nor the Fifth Circuit, nor the other overburdened reviewing courts ought to be obliged to permit an appellee, Moveable Offshore, to now exhume claims so frivolously pressed below that they are forgotten until the time for applying to a U. S. Court of Appeals for a motion for rehearing arrives, or to this Court for Certiorari, when such was not even entertained as a point or prayer at any other stage in the proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

By .....
YANCEY WHITE

CERTIFICATE OF SERVICE

I, Yancey White of Allison, Maddin, White & Brin, attorneys for Respondent, do hereby certify that I have mailed a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari, to John H. Benckenstein of Benckenstein & Norvell, P. O. Box 551, Beaumont, Texas 77704, Counsel for Petitioner, on this the 19th day of July, 1972.

.....
YANCEY WHITE